Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In re	
DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)	**Docket No. 14-CRB-0001-WR (2016-2020)**

DECLARATION OF TODD D. LARSON

1. I am a Partner in the law firm of Weil, Gotshal & Manges LLP. I am counsel for Pandora Media, Inc. ("Pandora") in the above-captioned proceeding. I respectfully submit this declaration in further support of the motion by Pandora, iHeartMedia, Inc., the National Association of Broadcasters, the National Religious Broadcasters Noncommercial Music License Committee, and Sirius XM Radio Inc. to compel SoundExchange, Inc. to produce negotiating documents directly relating to its written direct statement. I have personal knowledge of the facts stated herein.

2. Attached hereto as Exhibit A is a true and correct copy of SoundExchange's Opposition to Motion of Digital Media Association, the Broadcasters and NPR to Compel SoundExchange to Produce Negotiating Documents, Docket No. 2005-1 CRB DTRA (Mar. 15, 2006).

3. Attached hereto as Exhibit B is a true and correct copy of SoundExchange's Opposition to Motion to Compel Label License Agreements and Related Negotiation Documents, Docket No. 2006-1 CRB DSTRA (May 4, 2007).

4. Attached hereto as Exhibit C is a true and correct copy of SoundExchange's Opposition to DIMA, the Broadcasters, and NPR's Motion to Compel Production of Documents Related to the Testimony of Dr. Michael Pelcovits, Docket No. 2005-1 CRB DTRA (Oct. 30, 2006).

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: December 19, 2014
New York, NY

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Exhibit A

PUBLIC VERSION

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS	Docket No. 2005-1 CRB DTRA

SOUNDEXCHANGE'S OPPOSITION TO MOTION OF DIGITAL MEDIA ASSOCIATION, THE BROADCASTERS AND NPR TO COMPEL SOUNDEXCHANGE TO PRODUCE NEGOTIATING DOCUMENTS

SoundExchange hereby opposes the Motion filed by the Digital Media Association and Its Member Companies ("DiMA"), the Broadcasters, and NPR (collectively, "DiMA and its allies") to Produce Negotiating Documents.[1] For the reasons discussed below, that motion should be denied.

INTRODUCTION

The motion of DiMA and its allies is absurd in its breadth and the burden that it would impose if granted. DiMA and its allies seek every single document surrounding the negotiations of literally hundreds of different licenses for digital distribution of every kind, whether or not such agreements were submitted as part of SoundExchange's written direct statement. These agreements relate to a host of services, such as ringtones, digital downloads, and music videos that are outside of the statutory license. As discussed below, this would entail the search for and production of literally rooms full of documents.

[1] In addition to the arguments set forth in the instant Opposition, SoundExchange is providing a more complete recitation of the legal principles governing motions to compel in the Omnibus Brief in Opposition to Various Motions to Compel Filed by DiMA and Its Member Companies, the Broadcasters, NPR, and CBI, which SoundExchange is filing today. SoundExchange incorporates by reference the arguments made in the Omnibus Brief.

As support for its motion, DiMA can point only to one thing -- discovery in the last CARP proceeding on webcasting. But, as with so many other aspects of this case, DiMA and its allies are once again fighting the last war -- one they clearly lost. *Indeed, in the last proceeding, the Register denied the precise discovery sought here. See* Copyright Office Order, No. 2000-9 CARP DTRA 1 & 2, at 17 (June 22, 2001) (denying discovery into negotiating documents related to free market agreements submitted by record company witnesses) (attached hereto as Exhibit A).

DiMA and its allies appear to recognize that the documents they seek in their motion go far beyond the scope of permissible discovery. They essentially ignore whether or not the vast array of documents sought are "directly related" to SoundExchange's written direct statement. Instead, DiMA and its allies fall back, first contending that the CRB should have argument on the motion without allowing SoundExchange to brief it because the issues are "complex," Mot. Compel at 4, then creating a new discovery standard that would authorize them to obtain all negotiating documents "reasonably related," *id.* at 5, and finally claiming they can meet the heightened standard that the CRB's decisionmaking will be "substantially impaired" absent this vast array of documents. *Id.* at 6. But there is no basis for any of these claims.

Indeed, as discussed below, SoundExchange has already produced hundreds of agreements for digital distribution, and is prepared to produce additional agreements (in redacted or complete form) upon an order of the CRB addressing confidentiality concerns raised by the other parties to these agreements. Those agreements stand on their own as a reflection of what willing buyers and willing sellers agree to in the marketplace. There is no basis for going beyond the agreements themselves and compelling production of every document concerning the negotiations of such agreements, as DiMA and its allies would have.

BACKGROUND

SoundExchange's Written Direct Statement

In its written direct case, SoundExchange provided testimony of witnesses from the four largest record companies concerning the compensation that they receive for various types of digital distribution of sound recordings which are governed by the free market. *See, e.g.,* Written Direct Testimony of Lawrence Kenswil (Kenswil W.D.T.); Written Direct Testimony of Stephen Bryan. Their testimony shows that, in the marketplace for sound recordings, record companies regularly receive compensation greatly in excess of the current statutory rate. Indeed, even when record companies license 30-second clips of sound recordings to be used in purely promotional settings, they receive higher percentages of revenue and per stream rates than they do under the current statutory license for noninteractive webcasting. *See, e.g.,* Kenswil W.D.T. at 19. Moreover, that testimony reveals that, in virtually every other market, the structure of compensation that sound recording copyright owners receive is similar -- [redacted]

SoundExchange also provided the testimony of Dr. Michael Pelcovits, who reviewed record company agreements for interactive digital services.[2] Dr. Pelcovits examined the agreements for interactive services negotiated in the free market and examined marketplace evidence about how much consumers value the ability to select each sound recording vs. having music programmed for them according to their tastes. With these inputs -- all based on

[2] As Dr. Pelcovits explains, these services that are in many respects similar to non-interactive webcasting, except that they allow consumers to select the music that they listen to on their computer, rather than having the music be preprogrammed on one of the tens of thousands of webcasting channels currently available.

marketplace agreements -- he estimated the value of a license for noninteractive webcasting in a free market.

The agreements discussed in the testimony of the record companies and those examined by Dr. Pelcovits, of course, stand on their own. They speak for themselves about the marketplace for digital distribution of music and provide ample evidence of the much higher level of compensation that sound recording copyright owners receive in every market other than markets governed by a statutory license. Inclusion of mountains of background memoranda and correspondence with respect to each agreement will not improve upon the information gleaned from the agreements themselves. While positions on any given business issue may change throughout the course of a negotiation, the final terms are the ones that best reflect fair market value, at least with respect to agreements negotiated in the free market. There is no plausible argument that the agreements noted above were negotiated for purposes of establishing precedent for this rate proceeding -- they come in a host of different commercial contexts with a host of different parties, including many who are involved in this proceeding and some of the largest media companies in the United States, such as Yahoo!, AOL, Microsoft, and Clear Channel. Moreover, a substantial number of the agreements were negotiated by counsel for DiMA himself (Mr. Steinthal on behalf of such companies. By this motion, he seeks to have access to a massive array of internal competitive information from the record companies with whom he negotiates on a regular basis on these precise types of agreements, as well as competitive information about every one of the competitors of his clients, who also negotiate with the record companies for similar licenses. Such knowledge cannot help but give him an unfair advantage in future negotiations.

The Document Requests of DiMA and its Allies

As part of their discovery requests, DiMA and its allies sought copies of every digital distribution agreement entered into by the record companies. DiMA's requests were not limited to the agreements themselves or to particular testimony, but rather sought virtually every piece of paper surrounding such agreements, including internal documents and email and negotiations between the record companies and licensees. In its motion, DiMA suggests that it somehow "distilled" its original requests, Mot. to Compel at 5, but the documents sought in its motion are as overbroad as those in its initial requests.

In response to these requests, SoundExchange objected on a host of grounds, not the least of which is burden. Nonetheless, SoundExchange informed DiMA and its allies that it would produce the agreements of the types discussed in the written direct testimony of the record company witnesses in response to the requests, so long as licensees authorized such disclosure pursuant to the confidentiality provisions of each agreement. The record companies sought consent for the production of over 450 license agreements from scores of licensees. Many licensees consented so long as access to the agreements was limited pursuant to the protective order to outside attorneys only. SoundExchange produced over 250 agreements where licensees have consented and has continued to seek consent from other licensees who have not responded. A small number of licensees refused consent, some expressing concern that they did not want the attorney for their competitors (Mr. Steinthal) to have access to all of the agreements which they negotiated with the record companies.[3]

[3] At least two groups of licensees has requested that, even if the CRB orders production of agreements, such agreements should be redacted to include only their economic terms. *See* Mar. 14, 2006 Email from B. Rosenbloum to W. Gentz (attached hereto as Ex. B); Mar. 15, 2006 Ltr. from R. Khazarian to W. Gentz (attached hereto as Ex. C). To the extent that the CRB directs

DiMA and its allies also sought a vast array of documents concerning such agreements, including all documents surrounding the negotiations of such agreements and all documents reflecting performance under such agreements. In contrast to production of the agreements themselves, "all documents concerning the negotiation and performance" under such agreements encompasses a dizzying universe of documents. If this motion is granted, production will require review of literally rooms full of documents that relate to hundreds of separate negotiations, as well as the performance of every contract into which the record companies enter for digital distribution. *See* Part II. In addition, DiMA has sought documents related even to negotiations that never resulted in an agreement.

SoundExchange objected on a variety of grounds, including burden. Without waiving its objections that such documents fell far outside the scope of permissible discovery, SoundExchange agreed, however, to produce documents reflecting the back-and-forth negotiations with respect to the small number of agreements that were specifically referenced in the testimony of the record company witnesses, as well as to produce such documents for the 17 agreements on which Dr. Pelcovits relied.

As a consequence, SoundExchange has already produced over **250** license agreements and more than **12,000** pages of documents from the negotiating files of the various record companies. It has produced 1) all of the agreements specifically referenced in the record company testimony; 2) more than 200 hundred other agreements of the types discussed in the record company testimony; 3) the 17 agreements that Dr. Pelcovits relied upon; 4) all of the agreements that Dr. Pelcovits reviewed but chose not to rely upon; and 5) documents reflecting the negotiations back-and-forth between each record company and the individual licensee for

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the production of additional agreements, SoundExchange believes such an accommodation is appropriate, given the serious competitive concerns raised by DiMA's motion.

categories 1) and 3) above, except where a licensee has refused consent to disclose negotiating documents.[4]

ARGUMENT

DiMA's motion seeks a massive number of documents that are not directly related to SoundExchange's written direct statement in any way. Nothing in the CRDRA or past rulings by the Register can possibly support compelling the production of such documents here. Moreover, DiMA has failed to explain why the CRB's decisionmaking would be "substantially impaired" absent this vast array of documents. Finally, it would be unduly burdensome to compel the record companies to collect and produce documents that reflect every aspect of the negotiations surrounding hundreds of digital distribution agreement into which they have entered.

Nor is their any basis under the CRDRA or prior CARP precedent for compelling production of the negotiating documents concerning agreements referenced in SoundExchange's written direct statement. In the last proceeding, the Register denied a motion identical to that which DiMA and its allies has filed, and the unusual circumstances that led the last CARP to request a broader production of documents with respect to a specific category of RIAA agreements are simply not present here.

[4] With respect to one DiMA member that has not granted consent, SoundExchange informed DiMA so that it might obtain consent for production of these documents. SoundExchange is prepared to produce the remaining documents in category 5 upon an order by the CRB.

I. Nothing in the CRDRA or the Last CARP Proceeding Supports the Massive Document Production that DiMA and Its Allies Seek.

A. The Vast Array of Documents Sought Are Not Directly Related to SoundExchange's Written Direct Statement.

DiMA's motion argues that when a witness references *any* marketplace agreement, that reference expands discovery to encompass every scrap of paper concerning negotiations of *every* digital distribution agreement whether or not that agreement was discussed in testimony, or was even consummated in any way. Adopting such an interpretation would read all content out of the words "directly" and "related" in the CRDRA.[5]

As discussed above, SoundExchange has already produced a substantial quantity of documents responsive to the requests on which DiMA has moved to compel. Indeed, SoundExchange has produced not only the agreements specifically referenced in testimony and a host of similar agreements, where authorized to do so, but also produced thousands of pages reflecting the negotiations between the record companies and their licenses for agreements specifically referenced in SoundExchange's written direct statement. Moreover, SoundExchange is prepared to produce the remaining agreements, on such terms as the CRB may require. Under the CRDRA and past precedent from the Register, nothing more is necessary.

B. Contrary to DiMA's Claims, Precedent from the Last CARP Demonstrates That the Documents DiMA Seeks Are Well Beyond the Scope of Discovery.

DiMA looks to the last CARP to justify its motion to compel, but the Register's decision in that proceeding compels denial of DiMA's motion. In the last CARP proceeding, RIAA submitted testimony from the major record companies concerning licenses for digital distribution

[5] As discussed in more detail in SoundExchange's Omnibus Brief, this is another example of DiMA and its allies seeking to conflate ordinary document discovery limited to documents "directly related" to a witness statement with the broader discovery that may be permitted upon a showing of "substantial impairment."

other than for noninteractive webcasting under the statutory license. That testimony generally discussed the factors that the record companies consider in licensing sound recordings for digital distribution and provided the CARP with examples of the types of agreements negotiated in the free market. In many respects the testimony provided by the major record companies in this proceeding tracks the testimony they provided in 2001, but has been updated based on changes since 2001. *Compare* Kenswil 2005 W.D.T *with* Kenswil 2001 W.D.T. (attached hereto as Ex. D).

In 2001, DiMA and its allies sought the exact same documents that they seek here, claiming that the record company witnesses' discussion of the various types of licenses into which they entered in the free market opened the door to discovery into every scrap of paper related to the negotiations of those agreements, as well as to negotiations that did not lead to agreements. The Register of Copyrights denied such discovery, finding that, while the agreements themselves may need to be produced, there was no basis for requiring negotiating documents or other internal memoranda to be produced. Such ancillary documents simply were not related to the testimony submitted by RIAA. *See* Copyright Office Order, No. 2000-9 CARP DTRA 1 & 2, at 17 (June 22, 2001) (attached hereto as Ex. A).

As shown in the Register's decision, the Register drew a sharp distinction between 1) marketplace agreements for rights *other* than those directly at issue in this proceeding (such as those submitted by SoundExchange in this proceeding) and 2) agreements for noninteractive webcasting entered into in the shadow of copyright royalty proceedings and submitted as direct benchmarks for rates and terms to be set in these proceedings. With respect to the former, the Register prohibited discovery into ancillary documents, such as those related to the negotiations for such agreements. That decision is controlling here. With respect to the latter -- 26

agreements that RIAA put forward in the 2001 proceeding as benchmarks for the precise rights at issue and which were negotiated with the CARP proceeding looming -- the Register found that somewhat broader discovery was appropriate. For those agreements, the Register authorized discovery into the back-and-forth negotiations between RIAA and the licensees, but denied discovery into the internal discussions of RIAA's Negotiating Committee (as discussed below, the arbitration panel itself later directed production of such documents). *Id.*; Copyright Office Order, No. 2000-9 CARP DTRA 1 & 2 (July 6, 2001) (denying motion to reconsider) (attached hereto as Ex. E).

In this proceeding, all of the agreements submitted as part of SoundExchange's written direct testimony fall into the former category, not the latter. Just as in the last proceeding, they are marketplace agreements for rights outside the statutory license that are put forward as benchmarks to show the kinds of compensation for sound recording copyright owners receive in other markets. The fact that Dr. Pelcovits relied on 17 such agreements does not change their character or the relevance of the Register's decision in the last CARP. Dr. Pelcovits never reviewed any negotiating documents as part of his analysis.

Regardless, however, in an effort to avert having to litigate a motion to compel, SoundExchange has produced the agreements referenced in testimony, as well as the back-and-forth negotiating documents concerning those agreements (except in the small number of circumstances where licenses have refused to consent to disclosure of negotiating documents). Thus, SoundExchange has gone far beyond any possible view of its obligations. DiMA and its allies claim that SoundExchange has produced "relatively few documents" reflecting negotiations for the agreements discussed in testimony, but that is flatly false. In addition to the agreements themselves, SoundExchange has produced over 12,000 pages of negotiating

documents after searching the files of the record companies. SoundExchange not only provided the documents themselves, but two indices -- one reflecting the record company and the licensee to which the negotiating document referred (attached hereto as Ex. F) and one showing the document requests to which each document was responsive.

The CRB should follow the path already charted by the Register. Consistent with the Register's decision in the last CARP proceeding, it may be appropriate for the CRB to direct production of additional agreements that are currently being withheld due to confidentiality. But under no circumstances is there any basis for compelling production of negotiating or other documents related to digital agreements beyond the agreements themselves.

B. The Special Circumstances That Led the Last CARP to Request Broader Documents Are Not Present Here.

Because neither the CRDRA nor the decisions of the Register provide any support for its argument, DiMA and its allies instead attempt to rely on the very special circumstances surrounding the last CARP that led the arbitration panel to exercise its discretion and request a broader category of documents related to the operation of the RIAA Negotiating Committee. Those special circumstances are clearly not present here.

In the last proceeding, after the Register denied discovery sought here as impermissible under the rules, the arbitration panel itself requested the RIAA produce documents reflecting the operation of the RIAA Negotiating Committee. CARP Order, No. 2000-9 CARP DTRA 1 & 2 (Aug. 14, 2001) (attached hereto as Ex. G). This request was subject to the ordinary rules of document discovery served by the participants and did not purport to be an interpretation of the discovery to which DiMA was entitled. Notably, the CARP requested internal documents ***only*** with reference to the 26 benchmark agreements for noninteractive webcasting -- not with respect

to the kinds of free market agreements for other types of digital distribution that RIAA submitted in the last proceeding and that SoundExchange has submitted here.

The special circumstances that led the CARP to request additional documents are simply not present here. In this proceeding, SoundExchange has negotiated no direct agreements for noninteractive webcasting and has submitted no such agreements as direct benchmarks in this proceedings. Moreover, none of the agreements that Dr. Pelcovits relied upon for his analysis were negotiated in the shadow of the statutory license. Thus, the concerns that animated the CARP in the last proceeding -- that the agreements negotiated in the shadow of the statutory license may not be true benchmarks -- are in no way present here.

To be sure, DiMA and its allies would have the CRB believe that each record company is bent on manipulating all of its agreements in markets vastly more lucrative than this one in order to obtain precedent for this proceeding. Such conjecture -- besides being absurd on its face[6] -- provides no justification for the vast array of documents that DiMA now seeks. To the extent that DiMA wants to challenge whether the agreements on which Dr. Pelcovits relies as true marketplace agreements, it will have the opportunity to do so and ample documents to work from -- the agreements themselves and the back-and-forth negotiations between the record companies and other major companies, often DiMA members represented by Mr. Steinthal himself. Thus, DiMA will be able to determine, for example, if SoundExchange cherry-picked the agreements that were included in its written direct statement or, as is the case, SoundExchange selected neither the "best" nor the "worst" agreements but submitted those where it was authorized to do

[6] The sole "support" for this suggestion is a single document which notes that digital distribution agreements may be used as precedent in the context of rate proceedings -- that is hardly an exceptional proposition. *See* Mot. to Comp. at 10.

so by a particular license or licensee. But DiMA has provided no basis to compel SoundExchange to conduct a massive search for documents to support such a far-fetched claim.

C. Negotiations for Licenses Related to This Arbitration Are Not Proper Subjects for Discovery.

The last category of documents that DiMA seeks are documents related to any negotiation that SoundExchange may have had with respect to the statutory license. Such discovery is flawed for all of the reasons discussed above, as well as the following additional reasons.

First, SoundExchange has negotiated any agreements with webcasters with respect to the licenses at issue here. Moreover, nothing in SoundExchange's written direct testimony discusses or even addresses such negotiations. Because these discussions are confidential, both by agreement of the participants and by public policy, SoundExchange did not provide any testimony concerning such negotiations in its written direct statement. To claim that documents are somehow "directly related" to SoundExchange's written direct statement would thus render the statutory standard for discovery meaningless.

Second, under Federal Rules of Evidence 408, such documents could not be introduced into evidence as a basis on which to set rates and terms in these proceedings, and there is no basis for compelling production in discovery here. As explained in more detail in SoundExchange's opposition to the Motion to Compel agreements with respect to the SDARS, such documents are neither discoverable nor admissible.

Indeed, the policy against disclosure of settlement discussions applies with particular force here, where on participant is seeking documents concerning settlement negotiations and strategy *related to this very proceeding*. If the Board were to allow participants discovery about settlement discussions, it would severely chill the ability of participants to reach settlements in

future proceedings. The CRDRA attempts to foster settlement by, among other things, creating negotiation periods to force participants to engage seriously in settlement negotiations, 17 U.S.C. § 803(b)(3) (requiring period for voluntary negotiations); 17 U.S.C. § 803(b)(6)(C)(x) (requiring settlement conference during "21-day period following the end of the discovery period . . . [that] shall take place outside the presence of the Copyright Royalty Judges"). Participants should be encouraged to speak freely and candidly in their negotiations. *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003) ("In order for settlement talks to be effective, parties must feel uninhibited in their communications. Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination, under the ruse of 'impeachment evidence,' by some future third party."). If they believe that their negotiations will be subject to discovery, participants will not engage in the kind of open discussion that is likely to lead to settlements. "Then, the entire negotiation process collapses on itself, and the judicial efficiency it fosters is lost." *Id.*

II. DiMA and Its Allies' Motion Should Be Denied Because It Seeks Discovery That Is Unduly Burdensome.

Even if the CRB determines that the documents sought in DiMA's motion are somehow "directly related" to SoundExchange's written direct statement, it nonetheless should deny the motion because DiMA's requests are unduly burdensome. The requests appear to seek virtually every scrap of paper in any way connected with the negotiation of several hundred commercial agreements involving 4 major record companies and scores of licensees, almost none of which were submitted as part of SoundExchange's written direct statement.

The burden of such production would be enormous and impossible to complete in the short time frames in this proceeding. Indeed, the CRB can get some sense of the burden by

looking at what SoundExchange has already produced. As discussed above, SoundExchange has already produced documents reflecting the back and forth negotiations between licensees for the small number of agreements that are specifically referenced in record company testimony, as well as the 17 agreements that form the basis of Dr. Pelcovits' testimony. These documents are essentially correspondence, drafts, emails, and other documents between an individual record company and an individual licensee. With respect to those agreements alone, SoundExchange has already produced over 12,000 pages of documents. If the CRB were to direct SoundExchange to search for and produce similar documents for every one of the more than 450 digital distribution agreements that are the subject of DiMA's motion, as well as all other documents ancillary to such agreements, such as all internal memos, emails, etc., the burden would be overwhelming. Even if one assumes that the amount of internal correspondence is merely double than the amount of external correspondence (likely to be a conservative assumption), SoundExchange would likely have to search for and then conduct a detailed review of almost a million pages of documents in the incredibly short time frames of this arbitration. For even a single one of the major record companies, that is essentially a room full of documents (whether in hard copy or electronic form), all of which will have to be reviewed for privilege because of the close intersection between the advice of lawyers commenting on contract language and license negotiations.

DiMA and its allies have provided no basis for requiring such an overbroad search, which would undoubtedly delay these proceedings and serve no purpose other than stall these proceedings and burden SoundExchange and its witnesses and drive up the costs of participations in these proceedings.

III. DiMA Has Not Met the Heightened "Substantial Impairment" Standard for More Expansive Discovery.

As addressed in more detail in SoundExchange's Omnibus Brief, DiMA cannot justify its request for more expansive discovery based on the heightened "substantial impairment" standard in 17 U.S.C. § 803(b)(6)(C)(vi). As made clear in the legislative history and the CRB's own regulations, that provision is intended to be used sparingly to ensure that the CRB can obtain specific information it requires for its decisionmaking. *See* Omnibus Br. at 17-18. It is not intended to be a back-door way for participants to obtain discovery far in excess of that which is otherwise is permitted.

In its motion, DiMA fails to provide a basis for its claim that the CRB's decisionmaking will be substantially impaired without this vast array of documents. Other than its implausible conjecture about whether the hundreds of license agreements that the record companies negotiate outside the context of the statutory license are somehow being fabricated to influence this proceeding, DiMA provides no justification for why the CRB requires several hundred thousands pages of documents related to negotiations for ringtone agreements, digital download agreements, or on-demand subscription agreements. Finally, setting aside DiMA's failure to make a showing of substantial impairment, the additional considerations to which the CRB may look in analyzing whether additional discovery is warranted -- especially the burden -- cut against DiMA's motion. *See* 17 U.S.C. 803(b)(6)(C)(vi)(aa)-(cc).

PUBLIC VERSION

CONCLUSION

For all of these reasons, the CRB should deny DiMA's motion to compel negotiating documents.[7]

Respectfully submitted,

By _____

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Dated: March 15, 2006

[7] Similarly, the Board should deny the Webcasters' boilerplate request for "an Alternative Order" that would, among other things, prohibit SoundExchange from relying on, referring to, or basing testimony "on any of the agreements supported by any documents that it fails to produce pursuant to any order entered by the Board." Mot. to Compel at 18. Among other things, there is no basis for such an order absent a ruling that the broad range of documents they seek are actually discoverable. Moreover, such a harsh remedy is wholly inconsistent with SoundExchange's extensive document production.

Exhibit B

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
ADJUSTMENT OF RATES AND TERMS FOR PREEXISTING SUBSCRIPTION SERVICES AND SATELLITE DIGITAL AUDIO RADIO SERVICES	)	Docket No. 2006-1 CRB DSTRA

SOUNDEXCHANGE'S OPPOSITION TO MOTION TO COMPEL LABEL LICENSE AGREEMENTS AND RELATED NEGOTIATION DOCUMENTS

SoundExchange hereby opposes the Motion to Compel SoundExchange to Produce Label License Agreements and Related Negotiation Documents ("Motion"), submitted by Sirius Satellite Radio Inc. ("Sirius"), XM Satellite Radio Inc. ("XM"), and Music Choice (collectively, "the Services"). For the reasons discussed below, the Motion should be denied.

INTRODUCTION

The Services' Motion is a marriage of the absurd and the abusive. "Absurd" is certainly the only way to describe the Services' requests for the production of agreements, which falsely characterize SoundExchange as unwilling to produce further agreements. SoundExchange has *already* diligently obtained consent for and produced hundreds of agreements to the Services, and the Services know full well that the only impediment to further production is that SoundExchange has been unable to obtain consent from the contracting parties. The Services also know that SoundExchange has said that it will provide them with a spreadsheet specifying the rate terms of all of the agreements (including those for which it has not obtained consent to produce, with the party names redacted), and that SoundExchange would promptly comply with an order from this Court requiring production of agreements even absent consent. It is thus

ridiculous that the Services would accuse SoundExchange of shirking its discovery obligations on this matter.

To the extent that the Services seek to compel negotiating documents related to agreements that witnesses reviewed or relied upon in preparing their written direct testimony in this proceeding, SoundExchange has produced those documents. But to the extent that the Services' Motion can be understood to request negotiating documents for every one of over 600 agreements, it is nothing short of abusive. SoundExchange has already provided thousands of pages of such documents, yet it appears that the Services' Motion would require SoundExchange to obtain, review, and produce potentially *hundreds of thousands of additional pages* of negotiating documents. This would be a colossally unworkable burden, and one whose impracticality would be exceeded only by its uselessness. These negotiating documents were never reviewed -- let alone relied upon -- by any witness, and they provide no insight into SoundExchange's testimony about the agreements, which is primarily limited to their royalty terms. Those terms are presented in their final form in the agreements themselves, not the negotiating documents surrounding them, and so production of the negotiating documents would serve no purpose other than to waste SoundExchange's resources and time. While the Services claim that an earlier decision from this Court in Docket No. 2005-1 CRB DTRA establishes their entitlement to have SoundExchange obtain, review, and produce hundreds of thousands of pages of additional irrelevant material on the eve of trial, this Court's previous ruling does no such thing. On the contrary, this Court and the Registrar, have consistently recognized that such abusive and burdensome requests are wholly improper. As such, the Services' Motion should be denied.

BACKGROUND

SoundExchange's Written Direct Statement

In SoundExchange's written direct case, witnesses from two of the major record companies provided testimony concerning the compensation that their companies receive for various types of digital distribution of sound recordings. *See* Eisenberg WDT at 15-21; Kenswil WDT at 9-13. Their testimony shows that in the marketplace for sound recordings, record companies regularly receive a substantial portion of the revenues that those sound recordings generate. This percentage is far in excess of the *de minimis* rate proposed by the SDARS to govern sound recording performance royalties in this proceeding. Moreover, the testimony reveals that the terms for the deals have generally the same structure. In discussing these agreements, the witnesses referred specifically to three contracts: UMG-RealNetworks, *see* Kenswil WDT at 10; Sony-Verizon, *see* Eisenberg WDT at 19; Sony-Yahoo, *see id.* at 21.

SoundExchange also submitted the testimony of Dr. Janusz Ordover, who testified that he relied on Eisenberg and Kenswil's testimony about the digital contracts, *see* Ordover WDT at 43, and in deposition further indicated that, subsequent to the filing of his written direct testimony, he had corroborated their conclusions through a review of the recent contracts from all four major record companies. In addition, SoundExchange provided the testimony of Dr. Michael Pelcovits who referred to his analysis of agreements in the webcasting case in order to derive a measure of a proper royalty rate for the PES. *See* Pelcovits WDT at 36.

The Services' Requests

As part of their document requests, the Services sought every digital distribution agreement entered into by SoundExchange's label members, as well as every negotiating document, including drafts, internal and external email, and strategy documents related to those

agreements. Upon receiving these requests, SoundExchange immediately began the arduous process of seeking consent for hundreds of the requested agreements that, absent a court order, could not be produced without consent of the other contracting party. SoundExchange has subsequently produced to the Services (a) 285 agreements and amendments, for which either no consent was required or for which consent was given, (b) all negotiating documents, totaling 2,394 pages, for each agreement discussed by SoundExchange's fact witnesses, and (c) an index showing all agreements for which SoundExchange has sought (or did not need) consent, which identified the agreements for which SoundExchange has obtained consent and agreements for which consent has not been granted. The index also identified the parties to and date of each agreement, provided the Bates number for the produced agreements, and (at the request of opposing counsel) identified which of the agreements were reviewed or relied upon by Dr. Pelcovits in Docket No. 2005-1.

In the course of the meet and confer process, SoundExchange further stated to the Services that it (a) has no objection to producing copies of the agreements (subject to the terms of the protective order) so long as consent has been granted or there is an order of this Court compelling the production of the remaining agreements for which consent has not yet been granted, (b) would, at a minimum, provide the Services with an index listing rate terms for the agreements for which it currently lacks consent (with the identity of the parties to the agreements redacted); and (c) would oppose a motion seeking hundreds of thousands and perhaps millions of pages of negotiating documents, which would be unduly burdensome. The Services subsequently filed the instant Motion. The Services' Motion seeks the very agreements that SoundExchange has agreed to provide subject to an order by this Court, and wrongly claims that

SoundExchange has sought to prevent production of further agreements (when in fact SoundExchange has diligently sought consent to produce over 600 agreements).

Furthermore, whereas SoundExchange in its *Motion to Compel Sirius and XM to Produce Certain Content Deals, Negotiating Documents, and Internal Analyses of Content Deals That Are Directly Related to Their Written Direct Statements* (Apr. 27, 2007) in this proceeding carefully limited the number of negotiating documents it has sought to compel XM and Sirius to produce in light of the obvious burden of obtaining, reviewing and producing negotiating documents, *see id.* at 1 (seeking negotiating documents related to only *nine* agreements from XM and *eight* agreements from Sirius), the Services have persisted in their request for *every* negotiating document associated with *every* agreement. The Services' position represents a flagrant disregard of this Court's precedent. Moreover, the Services have not even tried to explain why or how the negotiating history of hundreds of agreements would be the least bit relevant here where there are hundreds of contracts that themselves provide overwhelming evidence of price terms.

ARGUMENT

The Services' Motion mischaracterizes SoundExchange's position on the production of agreements. The simple fact is that SoundExchange has produced every agreement for which it has obtained consent, has provided an index of all the agreements for which it has sought consent, and has agreed to produce another index showing the royalty terms in redacted form from the remaining agreements for which it has not obtained consent. This should be more than enough to satisfy the Services' request, but if it is not, SoundExchange stands ready to comply with an order from this Court requiring it to produce agreements even where consent has not been given.

Even more outlandish than the Services' posturing about SoundExchange's supposed bad faith concerning the agreements is their apparent claim for the negotiating documents associated with each of the more than 600 agreements. The Services have offered no justification for requiring SoundExchange to undertake the Herculean task of obtaining, reviewing, and producing what could be hundreds of thousands of pages of materials. The request is unduly burdensome and reflects a complete failure by the Services even to try to impose a rational limit on their document requests. It also squarely contradicts this Court's rules against overbroad document requests, *see* 37 C.F.R. 351.5(b)(1), and this Court's precedent that document requests must "not create an extensive burden of time and expense." *See Order Regarding DiMA and Its Member Companies' Motion to Compel SoundExchange to Produce Negotiating Documents Related to Its Direct Statement*, Docket No. 2005-1 CRB DTRA (Mar. 27, 2006).

Congress explicitly intended discovery in royalty proceedings to be "expeditious and efficient" H.R. Rep. No. 108-408 at 21, a fact that the Services ignore. But even if that were not true, there is no basis in law or logic for granting the Service's ill-conceived request.

I. SoundExchange Has Already Produced All Relevant Agreements for Which It Has Permission, Will Produce an Index Listing the Terms of All Agreements and, if Ordered by This Court, Will Produce All Agreements.

The Services' mischaracterization of SoundExchange's responsiveness is grotesque. SoundExchange has (a) already produced more than 280 digital distribution agreements and amendments to the Services, (b) sent out hundreds of additional letters seeking consent to produce more agreements, (c) provided an index of all the agreements for which it has sought, obtained, and not obtained consent, (d) agreed to provide an index listing rate terms for the agreements for which it currently lacks consent (with the identity of the parties redacted), and (e)

stated that it will produce the actual agreements for which it lacks consent if it is ordered to by this Court.

The Services know this, yet they have filed a Motion filled with overheated rhetoric accusing SoundExchange of "conveniently exclud[ing]" agreements from discovery and providing a "carefully orchestrated cherry-picked group of agreements." *See* Mot. at 10, 9. The allegations are in bad faith and are demonstrably false. The truth of the matter is that the Services have and will continue to receive all the agreements and information necessary to test the claims of SoundExchange's fact and expert witnesses.

The Services seek to compel SoundExchange to produce several categories of agreements. *See* Mot. at 1-2. SoundExchange will address each in turn.

A. Agreements Relied upon by SoundExchange's Experts

SoundExchange has already produced 285 of these agreements and amendments. As explained above, the only agreements in this category that SoundExchange has not produced are those for which it lacks consent. For those agreements, SoundExchange has already provided an index showing the agreements for which it has sought consent, and has stated that it will provide another index showing the price terms of those agreements that redacts the names of the parties to the agreements. SoundExchange believes that this is an adequate response to the Services' requests, but SoundExchange has gone further and has indicated it will cooperate if the Services wish to obtain an order from this Court to compel the production of the agreements that lack consent.[1]

[1] The Services darkly suggest that SoundExchange has somehow violated the confidentiality provisions of the agreements by showing them to its experts, or in fact has previously obtained waivers and has misrepresented matters to the Services and to the Court. *See* Mot. at 6 n.2. This accusation is baseless. The confidentiality provisions do not restrict counsel and consultants retained by counsel to review such documents; they plainly prohibit opposing counsel in a

B. Agreements Relied upon by SoundExchange's Fact Witnesses

SoundExchange has submitted as exhibits to its direct case the three agreements that its fact witnesses (Mr. Kenswil and Mr. Eisenberg) discussed in their written direct testimony. SoundExchange has also produced the negotiating documents related to these agreements.

C. Similar Agreements Dating Back to 2002 Not Relied upon by SoundExchange's Witnesses[2]

SoundExchange has provided all responsive agreements for which it has consent, including agreements dating back to 2002, and will provide the price terms of similar agreements where it lacks consent. Again, should the Court find this inadequate, SoundExchange will comply with an order requiring it to produce agreements for which it lacks consent.

D. Representative Agreements Between Major and Independent Record Labels and a Variety of Services Dating Back to 2002

This request is even more puzzling than the other demands the Services have made. First, SoundExchange has produced from all of the major record companies a broad range of agreements, including portable subscription on-demand, custom radio, non-portable subscription on-demand, on demand video, pre-programmed video, wireless digital downloads, audio digital downloads, and ringtones agreements. These are the categories of agreements that are

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litigation from reviewing such documents, absent consent or a court order. In addition, SoundExchange has shown the Services the list of agreements for which it has sought consent, and SoundExchange re-affirms that it has produced or will produce all agreements for which it has obtained consent.

[2] SoundExchange notes that the Services have inconsistently described this category in their Motion thereby making it impossible to know precisely what they are seeking. In the introduction to their Motion, the Services purport to ask for all agreements similar to the ones reviewed by SoundExchange's witnesses, "regardless of whether the experts or label witnesses relied on or reviewed the agreements." *See* Mot. at 2. Later, in arguing in support of the Motion, the Services contend that they are entitled to similar agreements "that were relied upon or reviewed by SoundExchange's ... witnesses." *See* Mot. at 14. As explained above, SoundExchange will interpret their motion broadly, and provide all such current digital distribution agreements subject to consent requirements.

referenced in the testimony of SoundExchange's witnesses, and they are representative. Indeed, the only category of agreements that the Services request that SoundExchange has not produced are digital jukebox agreements -- a service mentioned nowhere in any of SoundExchange's testimony, nor reviewed by any of its witnesses.

Likewise, SoundExchange is puzzled by the Services' requests for agreements between record companies and Muzak and DMX. To the extent the Services are referring to PES agreements, those are non-marketplace deals for which there are not meaningful agreements. To the extent that the Services are referring to agreements for video rights on those services, SoundExchange has produced a representative sample of those agreements.

Second, and even more outlandishly, the Services are also apparently seeking agreements from thousands of independent record labels who have submitted no testimony in this proceeding, whose agreements play no role in any witness's testimony, and whose agreements are not in SoundExchange's possession, custody or control. That request is wildly overbroad and unduly burdensome, and by definition wholly unrelated to any testimony that SoundExchange has presented. *See* 37 C.F.R. 351.5(b)(1). Once again, the Services offer no explanation for their blunderbuss approach, and this Court should deny their Motion to the extent it seeks agreements from independent record labels that have not submitted testimony on behalf of SoundExchange in this proceeding.

II. The Services' Request for Negotiating Documents Must Be Denied As Overbroad, Excessively Burdensome, and Unrelated to SoundExchange's Testimony.

The Services request the negotiating documents related to all agreements "relied upon, discussed or reviewed by Drs. Pelcovits and Ordover." *See* Mot. at 1. To the extent that their request can be understood to seek the production of negotiating documents only for the particular

agreements that Dr. Ordover and Dr. Pelcovits reviewed or relied upon in preparing their written direct testimony in this proceeding, there are no documents to produce. Dr. Ordover relied on the testimony of other witnesses (which attached three agreements as exhibits) for the market rates in his written direct statement, and Dr. Pelcovits relied on his own previous testimony in Docket No. 2005-1. For the three agreements specifically discussed and attached as exhibits to SoundExchange's written direct statement, SoundExchange has already produced the negotiating documents related to the agreements.

To the extent that the Services' request can be understood to seek the production of negotiating documents for the approximately 40 agreements that Dr. Pelcovits reviewed in preparing his written direct testimony in Docket No. 2005-1 CRB DTRA (which SoundExchange has submitted in this proceeding as designated testimony), SoundExchange has not produced those negotiating documents, but would be prepared to do so subject to an order from this Court that would solve the problem of lack of consent.

But to the extent that the Services' request can be understood to seek the production of all negotiating documents for all agreements reviewed by Dr. Ordover subsequent to his submitting his written direct testimony for the purpose of confirming his testimony, the request is preposterously overbroad. As an initial matter, Dr. Ordover reviewed no negotiating documents. He reviewed recent agreements solely to corroborate the conclusions in his written direct testimony. SoundExchange has sought consent for all such agreements.

Unlike SoundExchange, which is mindful of the burdens of discovery and has therefore moved to compel XM and Sirius to produce negotiating documents only for a handful of their

agreements with content providers,[3] the Services demand that SoundExchange produce negotiating documents for more than 600 agreements. Their request is a blatant attempt to harass SoundExchange. With such a broad request, the arithmetic quickly becomes astronomical: There are over 600 agreements at issue, and if each of them has 800 pages of negotiating documents (consistent with the more than two thousand pages of negotiating documents that SoundExchange produced for the three agreements it submitted as exhibits in this proceeding), that would require the production of an astonishing *half a million pages of material* (more than all the parties combined have produced to date in this proceeding).[4] It would require countless hours of work to search the files of the various record labels for the wide variety of negotiating material that the Services seek, and many more hours to review the documents for responsiveness and privilege (which itself can be extremely time consuming because of the close intersection of the advice of lawyers regarding contract terms and negotiations over contract terms), and then to process and produce them.

To allow the Services to compel the negotiating documents for over 600 agreements would undermine Congress's efforts in enacting the CRDRA to protect against "the potential for open-ended discovery which would ultimately lead to abuse and exorbitant costs." H.R. Rep. No. 108-408 at 31, reprinted in U.S.C.C.A.N. 2332. Congress hoped to "minimize discovery costs" and to "forc[e] participants to compress the amount of resources invested in the

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[3] *See* SoundExchange's Motion to Compel Sirius and XM to Produce Certain Content Deals, Negotiating Documents, and Internal Analyses of Content Deals That Are Directly Related to Their Written Direct Statements (Apr. 27, 2007) (seeking negotiating documents related to nine agreements specifically discussed in XM's testimony, and related to eight agreements specifically discussed in Sirius's testimony).

[4] Indeed, experience from the webcasting case suggests that this number could well be an understatement, and, if the Services' motion is granted, SoundExchange could have to search for, review and produce well over a million pages of documents, many of which may pose close questions regarding privilege.

proceedings," *see id.* at 32, but allowing the Services to compel production of the documents they seek would have precisely the opposite effect. It would also contravene this Court's holding that discovery requests should "not create an extensive burden of time and expense." *See Order Regarding DiMA and Its Member Companies' Motion to Compel SoundExchange to Produce Negotiating Documents Related to Its Direct Statement*, Docket No. 2005-1 CRB DTRA (Mar. 27, 2006) ("Docket No. 2005-1 *Negotiating Documents Order*").

No legal basis supports the Services' audacious and ill-conceived request to obtain additional enormous numbers of irrelevant negotiating documents, and this Court should deny it outright.

A. The Services' Request is Unduly Burdensome, Overbroad and Not Directly Related to SoundExchange's Written Direct Statement.

The Services' request for all negotiating documents is the quintessential example of an unduly burdensome and overbroad discovery request. This Court's rules prohibit overbroad requests in no uncertain terms: "Broad, nonspecific discovery requests are not acceptable." 37 C.F.R. § 351.5(b)(1). But the Services have blindly charged ahead with the requests anyway, seeking the production of negotiating documents for over 600 agreements, and defining "negotiating documents" as broadly as possible to mean

> any document or communication 'reasonably related' to any record label's negotiation of its license agreements, including any discussions, policies, positions or practices of any record label, the Negotiating Committee of any record label, or any other committee or subgroup of any record label, including without limitation the Board of Directors, concerning the development of and strategy for negotiating rates and terms for (a) the Statutory Licenses or (b) voluntary license agreements between record labels and any service with the business models described in SoundExchange's written testimony including, but not limited to, the strategy for negotiating the agreements upon which SoundExchange has relied in its written direct statement to support its rate proposal; or (2) any document or communication "reasonably related" to the negotiation of the agreements relied upon, discussed or reviewed by Drs. Pelcovits and Ordover.

See Mot. at 1, n.1. To read the definition is to see that its breadth and scope are abusive in the extreme. SoundExchange has identified 623 agreements that might conceivably be relevant to the testimony in this proceeding. Finding the negotiating documents for each of them would require going to each record company and conducting a laborious search for the wide array of negotiating documents that the Services are seeking. As discussed above, this almost certainly would entail the search for and review of 500,000 pages of documents (and that does not include review of additional documents that should not be produced due to privilege). It would simply be impossible for SoundExchange to conduct such a search, review all such documents for responsiveness and privilege, and process and produce all the documents in the tight timeframe for discovery provided for by the Court's rules.

Such a burden would be anathema to Congress's clearly stated intent to make proceedings before the Court "expeditious and efficient," H.R. Rep. No. 108-408 at 21, and to this Court's precedent that "the limited discovery" in these proceedings should "not create an extensive burden of time and expense." *See* Docket No. 2005-1 *Negotiating Documents Order*, at 1.

Such a monumental burden cannot be justified under any provision of the rules governing discovery. Clearly, these negotiating documents bear no relation -- let alone a direct relationship -- to the testimony of SoundExchange's witnesses. *See* 37 C.F.R. § 351.5(b)(1). No SoundExchange witness reviewed or relied upon *any* of the negotiating documents that the Services seek. And no SoundExchange witness even refers to such a document. The Services concede as much with respect to SoundExchange's expert witnesses, *see* Mot. at 7, although that has not kept them from asking for the negotiating documents all the same. The Services note that a few of SoundExchange's fact witnesses mention the negotiation process in general terms,

but that is hardly enough to make hundreds of thousands of pages of negotiating documents directly related or relevant to their testimony. Instead, as explained above, SoundExchange has already provided thousands of pages of negotiating documents for the three agreements that SoundExchange's witnesses discuss and that SoundExchange submitted as exhibits.

The Services' argument for the negotiating documents is even weaker when framed as a claim that they are necessary to prevent "substantial impairment" of the Court's resolution of the proceeding. 37 C.F.R. § 351.5(c). That argument requires the Services to show that the benefit of obtaining the documents outweighs the burden of producing them. *Id.*. As explained above, it is difficult to think of a request more burdensome than the Services' request for negotiating documents related to over 600 agreements from numerous record labels. And that burden is in no way justified by some sort of countervailing benefit. The Services' Motion is filled with vague assertions that the negotiating documents will somehow provide a necessary "context" for the agreements, but that assertion is plainly false given the manner in which the agreements are used by SoundExchange's experts.

Dr. Ordover relied on other witness testimony for the market rates in his testimony. Subsequently, he reviewed agreements solely for broad averages of royalty terms to confirm his initial analysis. Ordover WDT at 44. The terms of the agreements and the averages derived from them are simply what they are, and other negotiating documents will not shed light on them. Indeed, the Services themselves recognized this point in arguing that *they* should not be required to turn over even the limited negotiating documents SoundExchange has requested because the "terms of those deals are final and reflected in [the agreements themselves.]" *See* Letter from B. Reed to J. Freedman (Apr. 26, 2007). The relevance of negotiating documents to Dr. Pelcovits' testimony is even further attenuated. Dr. Pelcovits simply uses the rate he derived

from examining interactive webcasting contracts -- a rate about which he was cross-examined extensively in the Docket No. 2005-1 proceeding and whose use was accepted by the Court -- as a baseline for determining the rate for the PES. Having already calculated that rate in the earlier proceeding, there is no ground for reopening the negotiations that led to that rate here, nor have the Services plausibly articulated one.

In a case where there are a small number of agreements or highly individualized agreements, the negotiating history may well have some relevance or shed light on ambiguous terms. But there is no suggestion that these price terms are ambiguous, and any conceivable relevance of the particular negotiating history of any one contract's price terms is negated when there are many hundreds of such agreements and it is only the average price terms that are relied upon. For these reasons, the negotiating documents are not probative at all, let alone sufficiently probative to justify the mammoth burden producing them would entail.

B. This Court's Precedent Holds That Requests to Produce Hundreds of Thousands of Irrelevant Negotiating Documents Must Be Denied as Unduly Burdensome.

In Docket No. 2005-1, DiMA and the Radio Broadcasters (represented by the same law firms that represent XM and Sirius here) filed a motion that was very similar to the instant Motion. Like XM and Sirius, those services sought to compel SoundExchange to produce the negotiating documents related to hundreds of digital licensing agreements, and those services defined "negotiating documents" in language that was virtually identical to the overbroad definition that XM and Sirius have proposed in this proceeding.

This Court, however, denied that motion in large part, concluding that the services had asked "for too much without sufficient justification that the burden or expense of producing the requested materials is less than the likely benefit to the movants and the probative value." *See*

Order Regarding DiMA and Its Member Companies' Motion to Compel SoundExchange to Produce Negotiating Documents Related to Its Direct Statement, Docket No. 2005-1 CRB DTRA (Mar. 27, 2006).

To be sure, this Court ordered SoundExchange to produce the negotiating documents for a limited set of agreements, but in so doing this Court made clear that "[t]he limited discovery permitted in proceedings before the Copyright Royalty Board should permit the parties to test admissible evidence, but not create an extensive burden of time and expense. A balance of interests is required." *Id.* The Services have not learned the lessons of this Court's holding. Their request for the negotiating documents related to more than 600 agreements is a quintessential example of an attempt to obtain documents that create an extensive burden of time and expensive while doing nothing to test admissible evidence. While the burden of finding and producing negotiating documents for Dr. Pelcovits's 40 agreements in the webcasting proceeding was substantial, it pales in comparison to the Services' request in this case for documents concerning *over 600* agreements, and the Services offer no reasonable alternative, such as producing the negotiating documents for a small subset of the agreements.[5]

Moreover, the Services have made no plausible argument as to how undertaking this mammoth task will in any way test the evidence presented by SoundExchange's witnesses. As

[5] Certainly the CARP's decision in CARP 2000-9 DTRA 1 & 2 (August 14, 2001) is of no help to the services. That decision only required the production of negotiating documents relating to 26 agreements regarding the rights at issue in that proceeding, *i.e.*, sound performance rights via non-interactive webcasting. Thus, not only was the production required a mere fraction of what the Services seek here, but it was limited to agreements concerning the rights at issue in the proceeding in question, *i.e.*, here, sound recording performance rights for satellite radio and PES. The Services, however, are seeking negotiating documents only for other types of marketplace agreements, and thus their heavy reliance on the CARP's earlier ruling is entirely misplaced. Indeed the Registrar's 2001 decision in that proceeding, Copyright Office Order, No. 2009-CARP DTRA 1 & 2, at 17 (June 22, 2001) explicitly *rejected* the very claim that the Services are making here, when it denied discovery into negotiating documents for marketplace agreements for rights *other* than those directly at issue in the proceeding.

explained above, SoundExchange's witnesses rely on the express and clear royalty terms of these agreements, terms that are expressed in their final and complete form in the agreements themselves, not the myriad negotiating documents discussing them. In the face of the evidence of price terms culled from many hundreds of agreements, the particular bargaining history of any one contract becomes utterly irrelevant.

It is notable, in fact, that although the Services in Docket No. 2005-1 insisted on the need to obtain negotiating documents, those documents played *no* meaningful role at the trial, and were *never* mentioned in this Court's opinion setting rates and terms in that proceeding. The Services' motion in that case was an attempt to harass SoundExchange and distract it from trial preparation, and the Services' Motion in this proceeding is no different. In short, the Services' request fails the pragmatic test that this Court set out in Docket No. 2005-1, and it should therefore be rejected.

CONCLUSION

For the foregoing reasons, SoundExchange respectfully asks the Court to deny the motion to compel the production of the requested documents.

Respectfully submitted,

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May 4, 2007

CERTIFICATE OF SERVICE

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Exhibit C

PUBLIC VERSION

Before the
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Washington, D.C.

In the Matter of DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS	Docket No. 2005-1 CRB DTRA

SOUNDEXCHANGE'S OPPOSITION TO DIMA, THE BROADCASTERS, AND NPR'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS RELATED TO THE TESTIMONY OF DR. MICHAEL PELCOVITS

SoundExchange, Inc. ("SoundExchange") hereby respectfully submits this Opposition to the motion to compel production of documents related to Dr. Michael Pelcovits's testimony filed by the Digital Media Association and its member companies ("DiMA"), the Radio Broadcasters, and National Public Radio, its member stations and all CPB-Qualified Public Radio Stations (collectively, "Webcasters"). For the reasons discussed below, the Board should deny Webcasters' motion.

BACKGROUND

As the Board has made clear, discovery in this proceeding was intended to be "limited" solely to "permit the parties to test admissible evidence, but not create an extensive burden of time and expense. A balance of interests is required." Order Regarding DiMA's Mot. to Compel SoundExchange to Produce Negotiating Documents, Mar. 27, 2006, at 1 ("Negotiating Documents Order"). In the orders issued during the written direct phase of this proceeding, the Board repeatedly made clear that broad and non-specific requests would be denied and that, in all cases, the Board would look at the balance between evidentiary burdens and the benefits of the discovery sought. *See, e.g.*, Order Granting in Part and Denying in Part the Mot. of DiMA,

NPR, and the Broadcasters to Compel SoundExchange to Produce Discovery Relating to the Promotional Value of Airplay, Mar. 28, 2006, at 2 (denying requests as "overly broad, unduly burdensome and expensive relative to the amount of evidentiary benefit anticipated") ("Promotional Documents Order"); Negotiating Documents Order at 1 (denying requests as "too broad and nonspecific"); Order Denying the Supplemental Mot. of DiMA to Compel SoundExchange to Produce Documents Related to the Record Labels' Promotional Practices Known as Payola, Mar. 28, 2006, at 1 (denying requests as "unduly burdensome and expensive").

All of the above principles, especially the limited nature of the discovery, as well as an evaluation of the burdens at issue, are even more applicable to the rebuttal phase, which must proceed under extraordinary time pressure. In the rebuttal phase, the Webcasters (DiMA, the Broadcasters, and NPR), CBI, and RLI propounded 100 pages of document requests with more than 1000 separate, often multi-part requests. In response to the requests of the Webcasters, CBI, and RLI, SoundExchange produced over 70,000 pages of documents in a tight timeframe, including all documents each witness reviewed and all documents on which they relied for their testimony. The Webcasters and CBI have now followed with exceedingly broad multi-part motions, seeking a vast array of documents.

In preparing his written rebuttal testimony, Dr. Pelcovits consulted a number of sources, including data obtained from NPD, a third-party survey company that had conducted a digital music survey in 2005, and papers describing research by other experts and academics. Of particular concern to the Webcasters' motion, Dr. Pelcovits purchased "limited access to the Digital Music Study completed in December 2005" by NPD. *See* Exhibit A at 2 (contract between Dr. Pelcovits and NPD, which was produced to Webcasters). As the contract indicates,

NPD did not provide to Dr. Pelcovits with all of its survey data, but rather provided only a subset of data from its survey; moreover, it did not conduct the survey in anticipation of any litigation or arbitration. *Id.* ("Client acknowledges that the Purchased Services are expressly not designed for use in any legal, arbitration, regulatory or governmental proceeding or filing."). He also reviewed two papers written by Dr. Stan Liebowitz of the University of Texas at Dallas.[1] During the rebuttal phase discovery, as part of the over 70,000 pages of documents produced to the Webcasters, SoundExchange produced all documents within its possession, custody, or control, or that of Dr. Pelcovits, that were directly related to the data in the NPD survey that Dr. Pelcovits reviewed or the data in Dr. Liebowitz's papers.

Now the Webcasters seek to compel production of a broad array of documents that they claim are directly related to Dr. Pelcovits's testimony. *See generally* Mot. to Compel SoundExchange to Produce Documents Relating to the Testimony of Michael Pelcovits, Submitted by the Webcasters, served Oct. 24, 2006 ("Webcasters' Mot."). These documents fall into three basic categories: documents regarding the NPD survey *not* in the possession of Dr. Pelcovits or SoundExchange, all communications between SoundExchange or Dr. Pelcovits and certain third parties, and negotiating documents related to the 2003 agreement between SoundExchange and the SDARS, which Dr. Pelcovits references in his testimony.

The Webcasters' motion should be denied for several reasons. First, as is explained in greater detail below, SoundExchange has already produced all of the documents relating to the limited NPD data to which Dr. Pelcovits had access, including all substantive communications

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[1] Reviewing and relying on peer-reviewed papers and papers being readied for publication—as Dr. Pelcovits did in this case—is a staple of academic research, and such papers are of the kind "reasonably relied upon" by experts without reviewing the underlying data separately. *Cf.* Order Denying Joint Mot. to Strike Portions of the Testimony of Dr. Erik Brynjolfsson, June 5, 2006, at 2 (noting that experts reasonably rely on market research data without reviewing the underlying data themselves) ("Brynjolfsson Order").

between Dr. Pelcovits and NPD. Second, the Board has previously ruled that parties did not have to produce all communications with their witnesses, let alone all communications with an unrelated third party. *See* Order Denying in Part and Granting in Part CBI's Mot. to Compel SoundExchange to Produce Documents In Response to CBI's First Set of Document Requests, Mar. 27, 2006, at 1 ("CBI Order"). Finally, the Board has also already held that SoundExchange did not have to produce negotiating documents related to the SDARS agreement. *See* Order Granting in Part and Denying in Part the Motion of DiMA to Compel SoundExchange to Produce Its SDARS License Agreements and Related Documents, Mar. 28, 2006, at 1 (denying the request for negotiating documents as "too broad and nonspecific" and noting that many responsive documents "may well be protected by the attorney-client privilege") ("SDARS Order"). For all three of these reasons, Webcasters' motion is without merit and should be denied.

ARGUMENT

In the motion at issue, the Webcasters have moved to compel production of:

(a) all communications between Dr. Liebowitz and SoundExchange, counsel to SoundExchange, RIAA, or counsel to RIAA (*see* Pelcovits Document Request No. 100);

(b) the spreadsheet reflecting Dr. Pelcovits' [*sic*] econometric projection in its native format (*see* Pelcovits Document Request No. 103);

(c) the survey instrument used by NPD to produce the data, all documents reflecting the methodology of the survey, all documents reflecting the selection of panel participants, the raw responses to the survey from each panel participant, the eight spreadsheets referenced in the document produced at SX-REB003152-54, and the statistical tests referred to in the document produced at SX-REB003163-66 (*see* Pelcovits Document Requests 118-122 and 125-103); and

(d) internal and back-and-forth negotiating documents associated with RIAA's negotiation of the SDARS agreement (*see* Pelcovits Document Request Nos. 27, 29-31, and 33-36).

Webcasters' Mot. at 13. For the reasons discussed below, Webcasters' motion should be denied.

I. SOUNDEXCHANGE HAS ALREADY PRODUCED ALL OF THE REQUESTED NPD DATA

A. SoundExchange Produced the NPD Documents Reviewed by Dr. Pelcovits

The Webcasters have moved to compel production of documents related to the NPD survey. *See* Webcaster Mot. at 5 (citing RFPs 118, 120, 121, 125-30). In particular, the Webcasters complain that SoundExchange did not produce the survey instrument, the raw data from the survey, or information regarding the survey panel. *See* Webcaster Mot. at 6-7. The Webcasters are wrong on each count. The Board should deny the motion with respect to these requests because, as is explained in more detail below, SoundExchange has already produced all responsive documents.

SoundExchange produced the survey instrument reviewed by Dr. Pelcovits at SX-REB003117-18. As discussed above, Dr. Pelcovits was allowed under his agreement "limited access" to the survey data from NPD. *See* Exhibit A at 2 (contract between Dr. Pelcovits and NPD). He only received the questions from the survey instrument that related to the data that he had purchased, which focused on the promotional or substitutional impact of digital music services, namely the questions referred to in SX-REB003119. The document containing those questions is SX-REB003117-18. Dr. Pelcovits neither reviewed nor has possession of any other documents regarding the survey instrument used by NPD.

SoundExchange also produced all of the raw data provided by NPD under its contract with Dr. Pelcovits at SX-REB003077-116 and SX-REB003119-38. In addition, the Webcasters requested eight specific data files that were listed in a SAS program. *See* Webcasters' Mot. at 6

& n.5. The first two files listed are, respectively, SX-REB003077-116 and SX-REB003119-38. The remaining six files are output files created by the SAS program when run with those input files. SoundExchange has already produced all of the data from those files in documents SX-REB003145-50. Each of those documents contains two rows (labeled "Difference Between the Two Time Periods") that contains the entirety of the data from the output file for the same group (e.g., the chart labeled "Groups A&B" contains the output data from the "A&B" file, etc.). Nonetheless, SoundExchange is producing today separate copies of each output file.

Finally, SoundExchange also produced documents regarding the survey panel's composition at SX-REB003155-57 and SX-REB003160-62, including NPD's definition of its panel. The Webcasters also requested statistical tests mentioned in SX-REB3163-66. However, although Dr. Pelcovits requested that NPD run some additional analyses, NPD refused to do so. Those tests were never run, and there are no other documents related to them.

B. Dr. Pelcovits Does Not Have and Did Not Review Any Other NPD Surveys; Therefore, Webcasters' Motion to Compel Production of Other Surveys Must Be Denied

The Webcasters also moved to compel production of NPD surveys for years other than 2005, the year to which Dr. Pelcovits had access. Webcasters' Mot. at 5 (citing RFP 119). Webcasters' Motion with respect to RFP 119 is utterly without merit and must be denied.

As discussed above, Dr. Pelcovits purchased specific data for 2005 from NPD. *See* Exhibit A at 2. Dr. Pelcovits did not review NPD surveys for any years other than 2005, nor does he (or SoundExchange) have possession, control, or custody of any documents relating to such surveys. If the Webcasters wish to contact NPD and purchase any additional surveys, they certainly may. SoundExchange, however, should not be forced to do so for them.[2] Requiring

[2] In other proceedings, when a similar topic was raised, the Register noted that "the Library recognizes that witnesses, in preparing their testimony, do rely upon data that comes from

SoundExchange to purchase additional surveys, which were not even reviewed by its expert, would be unduly burdensome and expensive and wholly outside the "relatively limited [scope of] discovery" in these proceedings. *See* Order Denying the Supplemental Mot. of DiMA to Compel SoundExchange to Produce Documents Related to the Record Labels' Promotional Practices Known as Payola, Mar. 28, 2006, at 1; *see also* Negotiating Documents Order at 1 ("The limited discovery permitted in proceedings before the Copyright Royalty Board should permit the parties to test admissible evidence, but not create an extensive burden of time and expense.").

II. The Board Has Previously Rejected Motions To Compel All Communications Between SoundExchange and Its Witnesses; Therefore, the Board Should Deny a Motion To Compel All Communications Between a Witness and a Third Party or SoundExchange and a Third Party

The Webcasters have also moved to compel production of "[e]ach document reflecting or discussing any written or oral communication between NPD and Dr. Pelcovits, SoundExchange, counsel to SoundExchange, RIAA, or counsel to RIAA." Webcasters' Mot. at 10-11 & Attach. A at 7 (quoting RFP 122). The Webcasters have similarly moved to compel production of "[e]ach document reflecting or discussing any written or oral communication between Professor Stan Liebowitz and Dr. Pelcovits, SoundExchange, counsel to SoundExchange, RIAA, or counsel to RIAA." Webcasters' Mot. at 9 & Attach. A at 4 (quoting RFP 100). Webcasters' motion with respect to these requests should be denied as overly broad and not directly related to the written rebuttal testimony of a witness.

The Board has previously held that motions to compel "[c]orrespondence with and payments to witnesses are too broad and lack specificity." CBI Order at 1. In that case,

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outside sources, and that such data is often created by third parties who have no connection whatsoever to a CARP proceeding.... It is not the intention of the Library to require a party, whose witness states a number in his testimony, to produce all documents which track the history of that number back to its original source." Order of the Register, in Docket No. 96-3 CARP SRA (Feb. 7, 1997) at 5.

Collegiate Broadcasters, Inc. ("CBI") had propounded a series of requests for communications between SoundExchange and its witnesses. *See, e.g.*, CBI Request No. 28 ("All Documents reflecting any Communications between SoundExchange and any SoundExchange Testifying Witness relating to, reflecting, or referencing the substance of the witness's testimony."); *see generally* CBI's Mot. to Compel SoundExchange to Produce Documents in Response to CBI's First Set of Document Requests, filed Jan. 3, 2006, at 16-20. The Board flatly rejected that motion as overbroad. CBI Order at 1.

The motion at hand is even more overbroad and should similarly be rejected. Whereas CBI requested all documents reflecting communications between SoundExchange and its witnesses, here, by contrast, the Webcasters are moving to compel production of all documents reflecting communications between one of SoundExchange's witnesses *and a third party* that is otherwise unrelated to this proceeding and between SoundExchange itself and such an unrelated third party (not to mention communications between RIAA, which is not a participant, and third parties, who are not witnesses or participants). Such discovery requests are far afield from anything remotely related to the issues before the Board.

Neither NPD nor Dr. Liebowitz is a party or a witness in this proceeding. Neither was hired to conduct the respective studies that were cited by Dr. Pelcovits in his rebuttal testimony. As such, requesting all documents reflecting communications with them is simply overbroad, burdensome, and not directly related to any written rebuttal testimony. *See* CBI Order at 1.

Finally, even if the requests at issue did not violate the Board's orders requiring narrow and specific requests, the Board would nonetheless have to deny Webcasters' motion. With respect to documents actually reviewed by Dr. Pelcovits for his analysis, SoundExchange has fully complied with the discovery requests. With respect to documents reflecting

communications with Dr. Liebowitz, SoundExchange produced the only documents related to Dr. Liebowitz's research reviewed by Dr. Pelcovits – namely the two papers by Dr. Liebowitz that Dr. Pelcovits cited in his testimony. Dr. Pelcovits did not review any documents related to the data in Dr. Liebowitz's studies or his conduct of those studies other than the papers themselves—one of which was published in a peer-reviewed journal, the Review of Economic Research on Copyright Issues, in 2004 and the other of which is a working paper being readied for publication. As SoundExchange stated during its meet-and-confer with the Webcasters, Dr. Pelcovits and Dr. Liebowitz spoke once, but Dr. Pelcovits did not take any notes of that conversation.

Finally, as stated in SoundExchange's response to the Webcasters' Interrogatory Number 15, SoundExchange retained Dr. Liebowitz briefly as a consultant for this proceeding. The scholarly paper referenced in Dr. Pelcovits' rebuttal testimony was not created at the behest or direction of SoundExchange or its counsel. To the extent Webcasters' overbroad and vague requests are interpreted to reach communications between counsel and a non-testifying expert hired as a consultant during litigation, such communications are privileged under the attorney work-product doctrine. *See* Fed. R. Civ. P. 26(b)(4)(B) (prohibiting discovery into communications with non-testifying experts absent "exceptional circumstances").

III. THE BOARD HAS PREVIOUSLY HELD THAT § 351.10(e) DOES NOT APPLY TO THIRD-PARTY SURVEYS NOT COMMISSIONED FOR THIS PROCEEDING

The Webcasters argue that they are "entitled to all documents related to the Liebowitz and NPD studies . . . [under] the more specific standard for documentation of studies and analyses introduced as evidence under 37 C.F.R. § 351.10(e)." Webcasters' Mot. at 2. This claim is utterly without merit.

The Board has already ruled against the Webcasters on precisely this issue. *See* Order Denying Joint Mot. to Strike Portions of the Testimony of Dr. Erik Brynjolfsson, June 5, 2006, at 2 ("Brynjolfsson Order"). During the direct phase hearing, the Webcasters moved to strike a portion of Dr. Brynjolfsson's testimony because he relied on data produced by AccuStream iMedia Research. *Id.* at 1. In that instance, Dr. Brynjolfsson had used data from a third-party report purchased from AccuStream in his written direct testimony. SoundExchange produced copies of all the AccuStream reports reviewed by Dr. Brynjolfsson during discovery. During the hearing, the Webcasters then moved to strike all of Dr. Brynjolfsson's testimony related to the AccuStream reports because the information produced in discovery did not comply with the requirements of 37 C.F.R. § 351.10(e).

The Board rejected the Webcasters' claim. *Id.* at 2. In so doing, the Board distinguished between studies conducted by a testifying witness for purposes of the proceeding, to which 37 C.F.R. § 351.10(e) applies, and studies conducted by third parties that are cited or used by witnesses in this proceeding, to which it does not. In that case, the Board held that "there is no requirement in this rule that the [37 C.F.R. § 351.10(e)] information be provided for each data source or publication that may have found its way into the Brynjolfsson model." *Id.* Indeed, the Board went even further, holding that "the Register has previously ruled that there is no basis to strike *even the source study* when, as in the instant case, a witness has used data in a table from a publicly available study created by a third party and the third party's study was not commissioned specifically for the proceeding and that the third part[y's] study was disclosed to the other parties to the proceeding." *Id.* (citing Order in Docket No. 2000-9 CARP DTRA 1&2 (June 22, 2001) at 14-16) (emphasis in original).

Neither the NPD study nor either of the papers by Dr. Liebowitz were commissioned for this proceeding, and SoundExchange has already produced all documents within its possession, custody, or control, including all documents reviewed by Dr. Pelcovits related to the NPD study and to the papers by Dr. Liebowitz that Dr. Pelcovits cited in his testimony. Therefore, neither 37 C.F.R. § 351.10(e) nor the "directly related" standard of § 351.5(b)(1) provides any support for the Webcasters' claims, and the Board should deny Webcasters' motion to compel on these grounds.

IV. SOUNDEXCHANGE HAS PRODUCED A NATIVE FORMAT VERSION OF DR. PELCOVITS'S ECONOMETRIC PROJECTION

The Webcasters also moved to compel a native format file of an econometric projection performed by Dr. Pelcovits. Webcasters' Mot. at 6. As the Webcasters concede, SoundExchange produced a copy of this projection during its initial production in response to the Webcasters' requests. *Id.* SoundExchange today is producing a native format file of this document. Therefore, Webcasters' motion on this ground should be denied as moot.

V. THE BOARD HAS PREVIOUSLY REJECTED DIMA'S MOTION TO COMPEL PRODUCTION OF SDARS NEGOTIATING DOCUMENTS AND HAS ONLY COMPELLED THE PRODUCTION OF NEGOTIATING DOCUMENTS FOR AGREEMENTS THAT A PARTY HELD OUT AS A BENCHMARK

The Webcasters have also moved to compel the production of negotiating documents related to the SDARS agreement. *See* Webcasters' Mot. at 11-12 (citing RFPs 27, 29-31, 33-36). This motion is without merit.

As an initial matter, the Board has already ruled that SoundExchange did not have to produce the exact negotiating documents in question here—those related to the SDARS agreement. *See* SDARS Order at 1. In that instance, DiMA had moved to compel production of the SDARS agreement and "all documents, including emails and internal memoranda, concerning the negotiations of all such agreements whether or not such negotiations resulted in

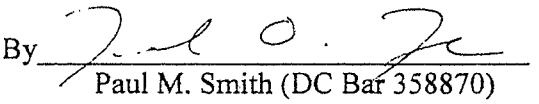
an agreement." *Id.* The Board compelled production of the SDARS agreement, but denied DiMA's motion with respect to the negotiating documents, holding that the request was "too broad and nonspecific . . . [and that] many of the documents within the scope of this request may well be protected by the attorney-client privilege." *Id.*

Indeed, in the orders issued during the direct phase of this proceeding, the Board has made clear that parties are not required to produce negotiating and other documents with respect to agreements unless they are relying on those specific agreements as benchmarks. Thus, the Board compelled production of negotiating documents related to the 40 license agreements reviewed by Dr. Pelcovits in conducting his benchmark analysis. *See* Negotiating Documents Order at 1. At the same time, the Board denied production of negotiating documents related to the digital music agreements of the types cited in testimony, but not relied on as benchmarks by Dr. Pelcovits. The Board noted that production of the agreements themselves, where permitted by consent of the licensee, was sufficient to "assist DiMA to assess the agreements presented as benchmarks." *Id.*

In this case, SoundExchange has never presented the SDARS agreement as a benchmark. Indeed, SoundExchange provided rebuttal testimony on this agreement solely because the Webcasters sought to use it in cross-examination of witnesses. *See, e.g.*, Tr., Vol. 4, May 4, 2006 (closed session) at 11-33 (testimony of John Simson). In response to the Webcasters' attempts to use the SDARS agreement as a benchmark, Dr. Pelcovits discussed the agreement in four paragraphs of his thirty-five page written rebuttal testimony. *See* Written Rebuttal Testimony of Dr. Michael Pelcovits at 6 ("One benchmark that counsel for DiMA suggested in cross-examination is to use the fees paid by the satellite digital audio radio services (SDARS) to license sound recordings.").

Under the Board's prior Order on negotiating documents, SoundExchange – by producing the SDARS agreement itself – has satisfied its obligation to produce documents directly related to Dr. Pelcovits' testimony. Other than the materials cited in his testimony and produced in discovery, Dr. Pelcovits did not review any "negotiating documents' related to the SDARS agreement and such documents form no part of his analysis. Finally, it is worth noting that even the Webcasters have abandoned the SDARS agreement as a benchmark. None of the Webcasters' rebuttal witnesses review or rely upon the SDARS agreement in their testimony – likely because they recognize the unsuitability of that agreement for any purpose in this proceeding. For the Webcasters to now claim that SoundExchange should have to search for and produce negotiating documents related to an agreement that no one before the Board believes to be an appropriate benchmark is unduly burdensome and expensive when compared to any potential benefit. The Board should reject this attempt by the Webcasters to get through the back door what they were unable to get through the front door and deny the Webcasters' motion once again.

Respectfully submitted,

By 

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Dated: October 30, 2006

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CERTIFICATE OF SERVICE

I, Craig A. Cowie, hereby certify that a copy of the foregoing **SoundExchange's Opposition to DIMA, The Broadcasters, and NPR's Motion to Compel Production of Documents Related to the Rebuttal Testimony of Dr. Michael Pelcovits** has been served this 30th day of October, 2006 by overnight mail and electronic mail to the following persons:

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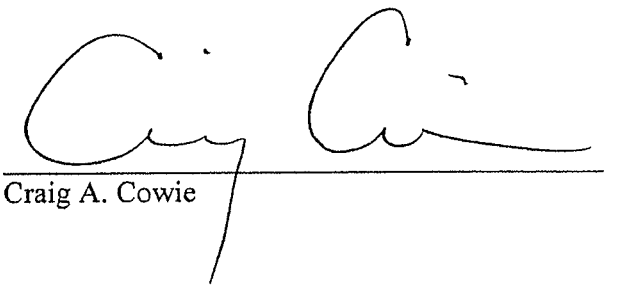

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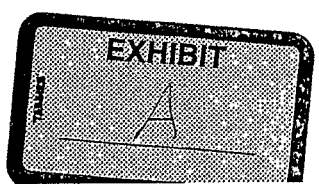
This exhibit is Confidential in its entirety and is therefore omitted from this Public version.



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I hereby certify that on December 19, 2014, I caused a copy of the foregoing PUBLIC document to be served by e-mail and first-class mail to the participants listed below:

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